NCTA
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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March 5, 2002

EX PARTE

Mr. William Caton
Acting Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Ex Parte Communication; In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GEN Docket No. 00-185

Dear Mr. Caton:

This letter will supplement the February 19, 2002, ex parte submission of the National Cable & Telecommunications Association ("NCTA") in the above-captioned docket. In that submission, NCTA asked the Commission to provide explicit direction on the limited power that local franchising authorities would have over cable modem service if that service were classified as an information service. As demonstrated below, the Commission has ample authority under the Communications Act and its own precedents to provide this direction.

First, as we pointed out on February 19, cable modem service is an interstate – indeed, a global – medium. The Commission has long asserted jurisdiction over interstate information services in part to preclude state and local regulation of such services.[1] Local regulation of "information services" also would be inconsistent with long-standing FCC policy to preclude unnecessary regulation of such services.[2] Limiting local authority over cable modem service, by

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[1] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 FCC 2d 512, 523-24, 541-42 (1981) (Commission exercised its exclusive jurisdiction over "interstate communication by wire or radio" to preempt any efforts by states to apply common carrier or utility regulations to firms that provide interstate information services), aff'd, *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983); *see California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994) (affirming FCC authority to preempt state regulation of jurisdictionally mixed enhanced services).

[2] *See, e.g., In re Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, ¶ 46 (1998) ("*Universal Service Report"*) ("An approach in which a broad range of information service providers are . . . presumptively subject to Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the

contrast, furthers Congress's and the Commission's goal of promoting broadband deployment and the unfettered operation of the Internet. *See* 47 U.S.C. § 230(b)(2); Telecommunications Act of 1996, § 706.

Second, section 253(c) of the Communications Act limits local government authority over "telecommunications providers" to rights-of-way management functions. 47 U.S.C. § 253(c). Notably, this limitation on local authority inures to the benefit of all "providers" of telecommunications and not just to telecommunications carriers. The reference to telecommunications providers rather than telecommunications carriers is not an accident, and indicates Congress's intent to extend the protections in this section to encompass providers in addition to common carriers,[3] including information service providers that also furnish the "telecommunications" to deliver that service to subscribers.[4] In the case of a cable operator providing an information service over a cable system, the cable system is the "telecommunications" component of the information service. As the Commission has often observed, rights-of-way functions allowed local governments under section 253(c) are strictly limited to those tasks those tasks "necessary to preserve the physical integrity of streets and highways," such as coordination of construction schedules, determination of insurance and bond requirements, and preventing interference between various rights-of-way users."[5]

Third, again as noted in our February 19 submission, the Cable Act limits local regulation of information services provided by cable operators. Congress has long reserved jurisdiction over interstate non-cable services offered by cable operators to the federal government.[6] The Cable Act "*defin[es] and limit[s]* the authority that a franchising authority may exercise through the franchise process." H. REP. 98-934, 98th Cong., 2d Sess. 19 (1984) (emphasis added). To the extent that the Cable Act does not authorize the exercise of a particular form of local

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healthy and competitive development of the enhanced-services industry"); *In re Second Computer Inquiry*, 77 FCC 2d 384, ¶ 114 (1980) ("We believe that, consistent with our overall statutory mandate, enhanced services should not be regulated under the Act").

3 *Cf.* 47 U.S.C. § 254(d) (requiring universal service contributions from "[e]very telecommunications carrier that provides interstate telecommunications services," but authorizing the Commission to extend this requirement to "other provider[s] of interstate telecommunications" as well).

4 An information service is provided "via telecommunications." *See* 47 U.S.C. § 153(20).

5 *See TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, ¶ 103 (1997) ("*Troy*"); *In the Matter of Classic Telephone Co., Inc., Petition for Preemption*, 11 FCC Rcd 13082, ¶ 39 (1996). As explained in our February 19 ex parte, the payment of the cable franchise fee constitutes "fair and reasonable compensation" for use of the rights-of-way to provide cable modem service.

6 *See* 47 U.S.C. § 541(d)(1) (authorizing States to require informational tariffs for any "*intrastate* communications service provided by a cable system") (emphasis added); *see also* H. REP. 98-934, 98th Cong., 2d Sess. 63 (1984) ("states would not have the authority to require cable operators to file informational tariffs for services (such as enhanced services and interconnection with interstate carriers) which are interstate in character"); 47 U.S.C. § 544(b)(1) (franchising authority may not "establish requirements for . . . information services").

regulation over cable operators, such regulation is prohibited. Where Congress intended to permit the imposition of additional or complementary local rules and requirements on cable operators, it so specified. *See, e.g.*, 47 U.S.C. §§ 551(g); § 552(d)(2); § 556(c). Local regulation of information services is not permitted anywhere in the Cable Act. Indeed, it is explicitly barred. *See* 47 U.S.C. § 544(b)(1).

Fourth, title VI delineates and limits local government authority over the construction and operation of a cable system. Franchising authorities may not regulate the services, facilities or equipment provided by a cable operator except as consistent with title VI. 47 U.S.C. § 544(a). Regulation of a cable system is not "consistent with" title VI unless it is specifically permitted therein. Requiring a separate franchise for cable modem service is impermissible because it would be inconsistent with section 621(a)(2) of the Cable Act, which provides that "*any* franchise shall be construed to authorize the construction of a cable system over public rights-of-way," without limitation on the services to be provided. 47 U.S.C. § 541(a)(2) (emphasis added).[7] In this regard, it is instructive that Congress expressly barred local franchising authorities from requiring cable operators to provide telecommunications facilities as a condition of a franchise grant or renewal. 47 U.S.C. § 541(b)(3)(D). The Commission and the Fourth Circuit have agreed that this prohibition would prevent municipalities from exercising authority over the facilities to provide cable modem service.[8]

Finally, even in the absence of a specific statutory grant, the Commission has historically asserted preemptive authority over the regulation of cable systems. Long before the enactment of the 1984 Cable Act, the Supreme Court upheld the FCC's jurisdiction over cable television as an exercise of its exclusive jurisdiction over "interstate communication by wire or radio." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). The Commission subsequently reaffirmed that the delivery of video programming was an interstate service and on that basis, its jurisdiction over the construction and operation of cable systems was upheld. *See General Tel. Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971). It later preempted state and local regulation of video content.[9] All of this occurred before a "cable communications" title was added to the Communications Act.

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[7] *See also* H. REP. 98-934, 98th Cong., 2d Sess. 44 (1984) ("[C]able operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable service they choose. . . . A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.").

[8] *See MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 364-65 (4th Cir. 2001); Amicus Curiae Brief of the Federal Communications Commission in *MediaOne Group, Inc. v. County of Henrico* at 18-20.

[9] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 702 (1984) (local governments oversaw "such local incidents of cable operations as delineating franchise areas, regulating the construction of cable facilities, and maintaining rights of way," while FCC retained "exclusive jurisdiction over all operational aspects of cable communication"); *see also City of Miami, Florida, Petition for Special Relief,* 56 R.R.2d 458 (1984) (local government's right to be compensated for the use of rights of way

As the foregoing demonstrates, the Commission has clear authority to limit the reach of local government regulation of cable modem services, even where such services are classified as information services. We respectfully urge the Commission to delineate these limits in this proceeding.

Please direct any questions regarding the foregoing to the undersigned.

Sincerely,

/s/ Daniel L. Brenner

Daniel L. Brenner

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Ken Ferree, Chief, Cable Services Bureau
Sarah Whitesell, Associate Bureau Chief, Cable Services Bureau
Susan Eid, Legal Advisor to the Chairman
Matthew Brill, Legal Advisor to Commissioner Abernathy
Stacy Robinson, Legal Advisor to Commissioner Abernathy
Susanna Zwerling, Legal Advisor to Commissioner Copps
Catherine Bohigian, Legal Advisor to Commissioner Martin

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must be balanced against the "extra-territorial" impacts that local burdens have on interstate communications).